In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1158

JOSEPH J. HURST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On retrial,[1] petitioner was convicted after a trial by jury in the United States District Court for the Middle District of Georgia on two counts of a fifteen-count indictment charging that, from on or about April 1, 1963, until July 29, 1963, he had conspired

[1] Petitioner's first conviction had been reversed by the court of appeals because of the introduction of evidence relating to the commission of prior crimes unrelated to the present charges. *Hurst* v. *United States*, 337 F.2d 678 (C.A. 5).

with others to violate provisions of the Internal Revenue Code relating to the production, possession and sale of distilled spirits (count 1) and that, on May 20, 1963, he had sold non-tax-paid liquor (count 9). The jury acquitted him on the two other sale counts in which he was named (3 and 11) (1 R. 13-19, 21-22; 2 R. 372).[2] On March 6, 1965, petitioner was sentenced to concurrent terms of imprisonment for one year and a day (2 R. 374-376). The court of appeals affirmed the conviction (3 R. 385-397, 423-424).

1. The government's evidence consisted essentially of the testimony of special employee Oscar Kennington and federal revenue agent James Allred, who accompanied Kennington in an undercover capacity.

According to Kennington, on March 9, 1963, he met petitioner, whom he already knew,[3] in Georgetown (Quitman County), Georgia, told him he was looking for "some stuff" (liquor) and asked if he knew where he could find any. Petitioner said he did not know, but that "Bub" Ogletree, who was then sheriff of Quitman County, might "have something now." Petitioner walked over to Ogletree, who was nearby, spoke to him for a moment, returned to Kennington,

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[2] The three other defendants—Bennett, Lynn and Ogletree—who were also variously named in the 14 substantive counts, did not appeal their convictions following the first trial.

[3] Kennington testified that in May 1962, petitioner had obtained his release on a liquor charge in Quitman County, Georgia, and, when he was arrested shortly thereafter for possession of the same liquor in a nearby Alabama community, petitioner had signed his bail bond (1 R. 49-56).

took his telephone number and said he would let him know when liquor was available (1 R. 59, 63-64; see also 1 R. 178-180).

On April 22, 1963, Kennington and agent Allred went to petitioner's home. After introducing agent Allred as his nephew, Kennington asked if petitioner had found out where he could get "any stuff." Petitioner said that Bennett "ought to have something" and drove to Bennett's farm with Kennington and Allred in the latter's automobile. Both the special employee and the agent testified that during the trip petitioner stated that he could guarantee their protection if they engaged in the liquor traffic in Quitman County so long as only he and Sheriff Ogletree knew about it (1 R. 77; 2 R. 197-198, 228). This conversation was recorded by a "midget tape recorder" concealed by agent Allred in the automobile (2 R. 197, 200; see also 1 R. 75). When they arrived at their destination, petitioner introduced the two men to Bennett who said he had no liquor at the time but that he would communicate with them when any could be obtained (1 R. 78-79; 2 R. 198-199).

On May 6, 1963, at about 10:30 p.m., Kennington and agent Allred again went to petitioner's home. While Allred waited outside, Kennington went in after being admitted by a woman who answered the door and directed him to petitioner's bedroom (1 R. 90; 2 R. 200-201). Petitioner told Kennington that Ogletree had said "he would have something in about a week or 10 days" (1 R. 90). Petitioner then telephoned Ogletree and stated he was sending the two men over (1 R. 90-91; see also 2 R. 200-201). Later

that same evening, Kennington, Allred and Ogletree went to the home of defendant Lynn, where the agent and the special employee purchased 40 gallons of non-tax-paid liquor (1 R. 96-99; 2 R. 200-204). At this time, Ogletree said he did not need Kennington's telephone number to arrange for future transactions since petitioner "has already got it and whenever I get anything else I'll let him call you" (1 R. 99; 2 R. 203).

On May 10, 1963, after unsuccessfully attempting to buy more liquor from Lynn, the special employee and the agent went to petitioner's home. Petitioner stated that Bennett was afraid to deal with them because of the rumor that they were federal agents. Petitioner added that he did not believe this and that he had told Bennett they were all right. He advised them to go to Bennett's home since he "might have something by now" (1 R. 100-101; 2 R. 204-206). Bennett told them that petitioner had convinced him that they were not federal agents and agreed to make a sale in a few days (1 R. 101-102; 2 R. 206-207). On May 17, 1963, and May 20, 1963, Kennington and Allred purchased 42 and 30 gallons of "moonshine liquor" from Bennett (1 R. 103-106; 2 R. 207-209). Following the 30-gallon purchase on May 20, the two men went to petitioner's home. Petitioner told Kennington that he had been unsuccessfully trying to get him "at home all day" to tell him that Ogletree had liquor for sale (1 R. 106; 2 R. 210). They then met with Ogletree who directed them to Lynn's house saying they should pay him for any purchase (1 R. 107;

2 R. 210-211). Kennington and Allred purchased 48 gallons of liquor from Lynn for $240 (Tr. 107-109; 2 R. 211). The conversations on the evening of May 20 were overheard by revenue agent Graham by means of a transmitting device Kennington had concealed on his person (1 R. 181-186).

On June 2, Ogletree came to Kennington's home and asked why he had not returned to see him since he had asked petitioner to call him. Kennington responded that he had not heard from petitioner. It was agreed at this time that Kennington would purchase liquor the next day (1 R. 109). On June 3, Kennington, from his home, telephoned petitioner. This conversation was overheard by other revenue agents listening in on an extension telephone with Kennington's consent (1 R. 109-110; 2 R. 236-237). Kennington asked petitioner to see Ogletree and find out if he could be extended some credit on a purchase. Petitioner said that if Kennington had any difficulty in this regard, he should telephone him (1 R. 109-110). That same day Ogletree agreed to a transaction pursuant to which 101 gallons of liquor were obtained from Lynn, with Kennington and Allred paying him $400, the balance ($105) to be paid later (1 R. 110-111; 2 R. 213-214). On June 6, 1963, agent Allred went to petitioner's home, told him that he was sorry that they had not paid before and gave petitioner the $105. Petitioner counted the money and said, "That's all right, that's all right" (2 R. 214-215; see 1 R. 111-112).

2. Just prior to the close of the government's case (after Kennington and Allred had completed their

testimony) the government introduced the tape recording of the April 22, 1963, conversation. The defense objected to its introduction only on the ground that it was inaudible in several places and that "it adds nothing to the trial of this case because we have had testimony from both of the government witnesses who are involved * * *" (2 R. 254-255, 284-285). The judge overruled the objections. The tape, which essentially corroborated the version of the conversation given by Kennington and Allred, was played for the jury (2 R. 256-284, 269). Also introduced without objection was agent Graham's testimony as to the overheard May 20 conversation.

Kennington carried a small transmitting device with him during several of his meetings with petitioner and the other defendants (see 1 R. 110-111, 148-150, 174, 190-191), but no other recorded or transmitted conversations were introduced into evidence. Nor was any testimony relating to the overheard June 3 telephone conversation (except that given by Kennington) introduced at trial.

The present challenge to the admissibility of the tape recording of the April 22, 1963, conversation, and the testimony of federal agent Graham concerning the overheard May 20, 1963, conversation on the ground that this evidence was the product of unlawful enforcement activity was not raised at trial. It is, in any event, foreclosed by this Court's decision in *Lopez* v. *United States*, 373 U.S. 427. Here, as in *Lopez*, there was no eavesdropping. "The Government did not use an electronic device to listen in on

conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." 373 U.S. at 439.

The April 22 conversation with petitioner in the agent's automobile was testified to fully by both Kennington and agent Allred before the recording was played. Both also testified to the events of May 20, before agent Graham's corroborating testimony was admitted. Petitioner's argument amounts to no more than the claim that he may rely on possible memory flaws of the actual participants without having to meet the force of corroborating evidence that is not susceptible to such impeachment. This was precisely the argument rejected in *Lopez*. See also *Osborn* v. *United States*, 385 U.S. 323, 327; *United States* v. *Mancusi*, 370 F.2d 601, 602-603 (C.A. 2).

Nor does the lawfulness of the official activity in this case depend on the rationale of *On Lee* v. *United States*, 343 U.S. 747, or require a reappraisal of that decision. Unlike *On Lee*, neither the recording nor the transmitted conversation overheard by agent Graham was introduced as a substitute for the live testimony of the actual participants to the conversa-

tions. They were used only to corroborate the testimony of the participants to those conversations. In these circumstances, there is no occasion for further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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